

RESOLUTION NO. 1278

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EDMONDS, WASHINGTON, RELATING TO LAND USE, ZONING AND SUBDIVISION, ADOPTING FINDINGS AND CONCLUSIONS TO AFFIRM THE DECISION OF THE EDMONDS HEARING EXAMINER TO CONDITIONALLY APPROVE THE WOODWAY ELEMENTARY PRELIMINARY PLAT AND PLANNED RESIDENTIAL DEVELOPMENT ON RE-HEARING, P-2007-17, PRD-2007-18, AND TO DENY THE APPEALS FILED BY RICHARD AND DARLENE MILLER, CONSTANTINOS AND SOPHIA TAGIOS, CLIFF SANDERLIN AND HEATHER MARKS, IRA SHELTON AND KATHIE LEDGER, LORA PETSO AND COLIN SOTHCOTE-WANT.

WHEREAS, the Burnstead Construction Company submitted preliminary plat and planned residential development applications to the City of Edmonds in 2007 for the subdivision and development of 5.61 acres located at 23700- 104th Avenue West into a 27 single-family planned residential development; and

WHEREAS, the City issued a Mitigated Determination of Non-Significance (MDNS) under the State Environmental Policy Act (SEPA) in April of 2007; and

WHEREAS, the SEPA MDNS was appealed by Lora Petso and others; and

WHEREAS, in June of 2007, the City Hearing Examiner conducted a public hearing on Burnstead's preliminary plat application, the PRD application and the appeal of the MDNS under SEPA; and

WHEREAS, on June 20, 2007, the City Hearing Examiner denied the MDNS appeals, conditionally granted preliminary plat approval, remanded the PRD and directed Burnstead to demonstrate its compliance with certain City code provisions with respect to the PRD, including the perimeter buffer requirement; and

WHEREAS, certain motions were made for reconsideration of this decision, and on August 8, 2007, the City Hearing Examiner denied these motions; and

WHEREAS, the City, Burnstead and others moved for reconsideration with respect to the decision on the proposed perimeter buffer for the plat and on September 28, 2007, the Hearing Examiner entered a consolidated order on reconsideration of their motions, granting PRD approval; and

WHEREAS, Ms. Petso appealed the preliminary plat approval to the Edmonds City Council, and the Council affirmed the Hearing Examiner's decision; and

WHEREAS, Ms. Petso appealed the City Council's decision to the superior court, which reversed the City's approval of the MDNS, preliminary plat approval and PRD approval; and

WHEREAS, Burnstead appealed the superior court decision to the Court of Appeals; and

WHEREAS, the Court of Appeals did not review the superior court decision and instead reviewed the decision of the City Hearing Examiner; and

WHEREAS, the Court of Appeals determined that Ms. Petso "met her burden to show that the hearing examiner's land use decision is erroneous, in part" and the Court remanded the case, but limited the remand to "addressing the issues concerning the drainage plan, the perimeter buffer and open space that we discuss in this opinion"¹; and

WHEREAS, the Hearing Examiner held an open record re-hearing on February 9, 2012, and in a decision dated March 7, 2012, issued Findings of Fact and Conclusions of Law conditionally approving the preliminary plat and PRD; and

WHEREAS, on March 15, 2012, the City of Edmonds filed a Request for Reconsideration of the Hearing Examiner's Decision, and in a decision dated March 19, 2012,

¹ Court of Appeals decision No. 64496-3, p. 24;

the Hearing Examiner issued her Decision on Reconsideration; and

WHEREAS, appeals of the Hearing Examiner's decision to conditionally approve the preliminary plat and PRD, as well as the SEPA decision were filed by Richard and Darlene Miller, Constantinos and Sophia Tagios, Cliff Sanderlin and Heather Marks, Ira Shelton and Kathie Ledger, and Lora Petso and Colin Southcote-Want; and

WHEREAS, the City Council has the authority to hold a closed record appeal of the Hearing Examiner's decision under Edmonds Municipal Code Section 20.07.005; Now, Therefore,

THE CITY COUNCIL OF THE CITY OF EDMONDS, WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

FINDINGS.

Section 1. Closed Record Public Hearing.

A. *Notice.* Notice of the Closed Record Public Hearing was provided as required by Edmonds Municipal Code Section 20.07.004(F).

B. *Hearing.* The closed record public hearing before the City Council was convened on May 15, 2012 and continued until May 21, 2012. The Council reviewed and voted on counsel's draft Findings of Fact and Conclusions of Law on May 29, 2012. Councilmember Petso did not participate in the closed record public hearing as a decisionmaker, but she did participate from the audience as an appellant.

C. *Appearance of Fairness, Conflict of Interest and Ex Parte Communications.* At the outset of the closed record public hearing on May 15, 2002, at the outset of the continued hearing on May 21, 2012 and prior to voting on the draft Findings of Fact and Conclusions of Law on May 29, 2012, the decisionmakers were asked to disclose any appearance of fairness,

conflict of interest and ex parte communications.

Mayor Earling disclosed that he received an e-mail from Mr. Sanderlin and the Millers regarding procedure before the Hearing Examiner. Finis Tupper presented the agenda memo for the closed record hearing, and noted that it stated that the recommendation of approval of the Hearing Examiner's decision came from Mayor Earling and staff. As a result, Mr. Tupper challenged Mayor Earling and asked him to recuse himself under the appearance of fairness doctrine. Lora Petso also challenged Mayor Earling and asked him to step down on this basis and because of his involvement in a Growth Management Hearings Board decision involving Mayor Earling (as a decisionmaker), Ms. Petso and the same property. Colin Southcoat-Want, Cliff Sanderlin, Roger Hertrich joined in the challenge to Mayor Earling.

Councilmember Buckshnis disclosed that appellant Petso called her twice on May 2, 2012 and left a message regarding the selection of the Council's attorney. Councilmember Buckshnis called her back, but when she began to talk in detail about the Council's attorney, Councilmember Buckshnis stated that she would not discuss the subject further. In addition, Councilmember Buckshnis stated that Mr. Sanderlin and Ms. Marks contributed to her campaign. Dave Page also told Councilmember Buckshnis before the continuation of the closed record hearing on May 21, 2012 that she asked good questions.

Councilmember Plunkett disclosed that he had contributed to Ms. Petso's campaigns several times. He further disclosed that he received campaign contributions from Mr. Sanderlin and Ms. Marks in at least three of his five campaigns.

Councilmember Bloom disclosed that Mr. Sanderlin and Ms. Marks contributed to her campaign and doorbelled for her.

Councilmember Fraley-Monillas disclosed that she had seen e-mail titles that she

assumed were related to this project over the past year, but did not read them.

Some of the Councilmembers disclosed that an e-mail had been distributed covering the issue of Ms. Petso's ability to remain in the room, even though she was not participating in the closed record hearing as a decision-maker. (It was explained that because she was an appellant, and had not been recused from participating in the closed record hearing as a decision-maker under the appearance of fairness doctrine, that she would be able to remain in the room.)

Cliff Sanderlin challenged the hearing as a violation of his due process rights because staff sent a 100 page report to the appellants containing very complex material and expected the appellants to digest it, formulate their position and return to the hearing within less than a week. He believed that it was a violation of his due process rights to have the Mayor and Council's attorney speak during the hearing. He also believed that their due process rights were violated because the appellants were told three hours before the hearing about the format of the hearing and how much time they would have to speak.

All of the above decisionmakers believed that they could remain impartial and participate in the closed record hearing, even in light of the disclosures. Although the challenges to Mayor Earling did not rise to an appearance of fairness violation, the Mayor decided not to participate in the closed record hearing to avoid clouding the issue and left the room prior to the proceedings on May 15, 2012. The appellants were left to address their alleged "violation of due process rights" as they wished.

D. *Exhibits.* The following documents were submitted after the Hearing Examiner's decision dated March 7, p. 3.²

23. **Hearing Examiner's Decision** 3-7-12

² The numbering for the exhibits follows the Hearing Examiner's numbering of Exhibits.

24. City's Request for Reconsideration, 3-15-12.
25. Hearing Examiner's Order on Request for Reconsideration 3-19-12.
26. Appeal of SEPA, PRD and Subdivision Approval from L. Petso and C. Southcote-Want, 3-30-12.
27. Appeal of SEPA, PRD and Subdivision Approval from I. Shelton and K. Ledger, 4-2-12.
28. Appeal of PRD of Burnstead Construction Co. from C. Sanderlin and H. Marks, 4-3-12.
29. Appeal of SEPA, PRD and Subdivision Approval from R. and D. Miller and C. and S. Tagios, 4-3-12.
30. E-mail from L. Petso to K. Lien dated 4-27-12.
31. Brief of C. Sanderlin & H. Marks 4-27-12.
32. Brief of R. and D. Miller and C. and S. Tagios, 4-26-12.
33. Brief of L. Petso dated 4-27-12.
34. Burnstead's Response to Appeals, 5-4-12.
35. City Staff's Analysis of Legal Issues from J. Taraday, 5-4-12.
36. Memo from K. Lien, Associate Planner, 5-4-12.
37. Memo from Public Works Staff, 5-4-12.
38. Response to Rebuttals of Our Appeal, C. Sanderlin & H. Marks 5-9-12.
39. Rebuttal to Burnstead Response, L. Petso & C. Southcote Want 5-9-12.
40. E-mails from Lora Petso to Kernen Lien dated 5-24-12.
41. Two Requests for Public Records from Lora Petso dated 5-24-12.
42. E-mail from David Johnston to Lora Petso dated 5-24-12.
43. Letter to Lora Petso from Carol Morris dated 5-24-12 with enclosure.
44. Minutes of the Edmonds City Council Meetings dated 5-15-12 and 5-21-12.

45. Letter to Kernan Lien from Jake Murphree dated 5-22-12.

E. *General Jurisdiction.* “An appeal must be filed within 14 days after the issuance of the hearing body’s decision. . . . Appeals, including fees, must be received by the city’s development services department by mail or by personal delivery at or before 4:00 p.m. on the last business day of the appeal period. Appeals received by mail after 4:00 p.m. on the last day of the appeal period will not be accepted, no matter when such appeals were mailed to postmarked.”³ “For purposes of computing the time for filing an appeal, the day the hearing body’s decision is issued shall not be counted.”⁴

Burnstead Construction Company has raised the issue that the Sanderlin and Miller Appeals were untimely and must be dismissed.⁵ Burnstead argues that Hearing Examiner’s Order on Reconsideration was issued on March 19, 2012. The Sanderlin Appeal and Miller Appeal were received on April 3, 2012. However, the Appellants claim to have been given the appeal deadline of April 3, 2012 by Kernan Lien, of the Edmonds Planning Department.⁶ In an e-mail dated March 22, 2012 to Darlene Miller, K. Lien states that the appeal must be filed within 14 days of the decision, and “the date the decision was mailed is the date of issuance was March 20, so the appeal deadline is 4 p.m. on April 3rd.” Because the word “issued” is not defined in the Edmonds Community Development Code, the administration’s calculation of the appeal deadline was reasonable when considered in light of analogous law.⁷

There are four separate appeals. The appeal issues in these four appeals are very similar, if not the same. Therefore, even if the Council were to dismiss one or more of the appeals as

³ ECDC Section 20.07.004(B).

⁴ ECDC Section 20.07.004(C).

⁵ Burnstead Response to Appeals, pages 2-3.

⁶ Sanderlin & Marks’ Response to Rebuttals, No. 1 on p. 1.

⁷ See, e.g., RCW 36.70C.040(4).

untimely, the Council would still be required to address the same appeal issues. The Council decided not to dismiss any of the appeals as untimely.

Burnstead Construction also asked that the appeals be dismissed because they failed to comply with the requirements for closed record appeals.⁸ In sum, Burnstead alleges that the appeals do not have references to the administrative record, allege facts that are not in the administrative record and that the appeals are incorrectly typed, and exceed the page limit requirements.⁹

It is true that “no new testimony or other evidence will be accepted by the city council,” but there are certain exceptions to this rule not applicable here.¹⁰ In addition, the Council notes that:

Parties to the appeal may present written arguments to the city council. Arguments shall describe the particular errors committed by the decisionmaker, with specific references to the administrative record. The appellant shall bear the burden to demonstrate that the decision is clearly erroneous given the record.¹¹

Because the appellant bears the burden to demonstrate that the Hearing Examiner’s decision is clearly erroneous given the record, any failure by an appellant to submit written materials conforming to the code requirements could result in the Council’s denial of the appeal. For example, the Council “shall determine whether the decision by the hearing/body officer is clearly erroneous given the evidence in the record.”¹² If the appellants’ written materials are insufficient to such an extent that the Council is unable to locate the portion of the record to support the appellants’ argument, then this could result in a denial of the appeal. The Council will not dismiss the appeals prior to consideration of the merits based on alleged procedural

⁸ Burnstead’s Response to Appeals, lines 16-24, p. 3 through lines 1-10, p. 5.

⁹ *Id.*

¹⁰ Edmonds Municipal Code Section 20.07.005(B).

¹¹ Edmonds Municipal Code Section 20.07.005(C).

¹² Edmonds Municipal Code Section 20.07.005(H).

insufficiencies.

F. *Council's Jurisdiction on Closed Record Appeal on Remand.* The Burnstead Construction Company is proposing to subdivide 5.61 acres and develop a 27 lot single family preliminary plat/Planned Residential Development with four open space tracts and two joint use driveways serving two homes each. The applicant received preliminary plat and PRD approval from the City of Edmonds in 2007. This decision was appealed to Superior Court and again appealed to the Court of Appeals. The Court of Appeals remanded the plat/PRD for further proceedings before the Hearing Examiner, limiting the proceedings before the Hearing Examiner to the issues concerning: a) the drainage plan, b) the perimeter buffer, and c) open space, while affirming the applicant's burden on remand to demonstrate compliance with all applicable laws current at the time of vesting.

On remand, the Hearing Examiner approved the revised PRD and preliminary plat applications with conditions. Because the Hearing Examiner's jurisdiction on remand was limited to: a) the drainage plan, b) the perimeter buffer, and c) open space, an appeal to the City Council of the Hearing Examiner's decision on remand is similarly limited.

G. *SEPA:* Appeals were filed based on the Hearing Examiner's decision, finding of fact 8:

There is nothing in the record to suggest that the City's civil and building permit review processes would not be able to fully mitigate all project specific impacts. There are no material adverse impacts discernible from the record. Additionally, the SEPA MDNS issued on April 19, 2007 appeals were denied. Subsequent decisions by the Superior and Appellate courts have upheld the SEPA decision. The Examiner concludes, as evidenced by the MDNS, there are no potential adverse impacts resulting from the approval of the preliminary plat/PRD if the conditions of approval are implemented.¹³

¹³ Pages 10-11, Hearing Examiner's Decision (No. 000010-11).

First, the appellants challenge the Hearing Examiner's characterization of the Superior Court's decision as "upholding the SEPA decision." While the City Council disagrees with the characterization of the superior court decision, it is of no importance at this stage in the proceedings.¹⁴ The Court of Appeals did not find fault with the MDNS and specifically limited the remand to three issues, none of which involved the SEPA MDNS.

Second, even if the Court of Appeals had not limited the jurisdiction on remand, state law authorizes the Hearing Examiner's determination that the City's code review process would be able to fully mitigate all project specific impacts, given that there are no significant adverse impacts discernible from the record. In the review of a project permit application, Edmonds is required to first determine a proposed project's consistency with its development regulations or comprehensive plan during project review by considering the type of land use, level of development, infrastructure and development characteristics.¹⁵ Next, the City may "determine that the requirements for environmental analysis and mitigation measures in development regulations and other applicable laws provide adequate mitigation for some or all of a project's specific adverse environmental impacts to which the requirements apply."¹⁶ The Appellants have not demonstrated that the Hearing Examiner's decision not to address the previously issued SEPA MDNS is "clearly erroneous" by alleging that there is "insufficient proof that the storm system will work" or that there is "potential for harm to the people of Edmonds." In addition,

¹⁴ On review of a superior court's land use decision, the court of appeals stands in the shoes of the superior court and reviews the administrative decision on the record before the administrative tribunal, not the superior court record. *Satsop Valley Homeowners Ass'n. v. N.W. Rock, Inc.*, 126 Wn. App. 536, 541, 108 P.3d 1247 (2005). "Where . . . the superior court is required to serve in an appellate capacity to an administrative action but issues findings of fact and conclusions of law, this court simply disregards such findings and conclusions as surplusage." *Wellington River Hollow LLC v. King County*, 121 Wash. App. 224, 54 P.3d 213 (2004), footnote 3.

¹⁵ RCW 36.70B.040.

¹⁶ WAC 197-11-158; RCW 36.70B.030.

the appellants' SEPA appeals include allegations that are outside the jurisdiction of the Hearing Examiner and the City Council (critical areas, traffic, parking).

H. *Staff Report.* Associate Planner Kernen Lien described the history of the application. He confirmed that the Court of Appeals remanded this matter back to the Hearing Examiner to address three items: storm drainage, perimeter buffer and open space. The storm water drainage issues are covered in the Memo dated May 4, 2012 from the Edmonds Public Works Staff and the perimeter buffer and open space issues are covered in the Memo dated May 4, 2012 from Kernen Lien.

I. *Oral Argument by Appellants.* A detailed and complete summary of the oral argument presented by Appellants has been included in the Minutes of the Edmonds City Council Meetings dated May 15, 2012 and May 21, 2012. The City Council hereby adopts the same by reference as if fully set forth herein.

J. *Standard of Review.* The City Council "shall determine whether the decision made by the hearing body/officer is clearly erroneous given the evidence in the record."¹⁷ The Council shall affirm, modify or reverse the decision of the Hearing Examiner.¹⁸ Because this is a closed record hearing, the Council can't base its decision on evidence that is presented for the first time in the appeal. Therefore, if the Council decides to modify or reverse the decision of the Hearing Examiner, it must identify the portion of the record upon which such modification or reversal is based.

K. *Appeal of Drainage Plan.*

1. *Vested Rights.* The Woodway Elementary Preliminary Plat and PRD is

¹⁷ ECDC Section 20.07.005(H).

¹⁸ ECDC Section 20.07.005(H).

vested to the DOE 1992 *Stormwater Management Manual for the Puget Sound Basin*.¹⁹ In the recent drainage submittals, the Applicant used the technical guidance in the 2005 King County Surface Water Design Manual for converting the field infiltration rate to the design infiltration rate.²⁰ The City Staff found this to be more appropriate because the more recent Manual provides for a larger factor of safety than does the older 1992 Ecology Manual.²¹

In recent revisions to the drainage documents, the Applicant used a factor of safety of 5.5, which resulted in sizing the infiltration vault using a design infiltration rate of 2.3 inches per hour.²² With this revision, the City Staff determined that “this preliminary design parameter satisfies the Appellate Court’s recommendations for a proper design infiltration rate obtained from field infiltration tests done at the site of the proposed facility. This method of determining the field infiltration rate meets or exceeds the standard to which the applicant is vested.”²³

On remand, the Hearing Examiner issued a decision requiring that the Applicant demonstrate compliance with all stormwater best management practices requirements pursuant to the 1992 DOE *Stormwater Manual*, “including the ultimate value for the design infiltration rate, even if more recent methodologies are employed to determine design parameters of the stormwater facility.”²⁴ Specifically, the Examiner held that:

The storm drainage system was significantly revised from 2007 to reflect a more conservative storm water infiltration rate and changes to infiltration testing locations and methodologies. The City testified that they are satisfied the Applicant’s preliminary stormwater design is adequate to meet ECDC 18.30 and the vested 1992 Ecology storm water manual. No opposing expert testimony was offered. As conditioned, the stormwater impacts will be mitigated and the

¹⁹ Memo from Public Works Staff dated May 4, 2012, p. 4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

requirements of ECDC 18.30 will be satisfied. . . .²⁵

The Appellants have argued that the City failed to correctly apply vesting requirements, including waiving the 1992 stormwater manual for testing methodology, claiming that “vesting can’t be waived.”²⁶ However, the facts show that the Applicant has not “waived” its vesting under the 1992 *Stormwater Manual*. Instead, the Applicant chose to comply with the 1992 *Stormwater Manual* and also to exceed the requirements of that *Manual* by using the technical guidance in the 2005 King County Surface Water Design Manual for converting the field infiltration rate to the design infiltration rate, which provides for a larger factor of safety.²⁷ The Appellants have not demonstrated that this conclusion is clearly erroneous.

2. Comprehensive Plan. Appellants argue that the plan to raise the grade and remove the existing drainage ditch in the NW part of the property is not in compliance with the intent of the City of Edmonds’ Comprehensive Plan adopted on March 15, 2005 and again on December 22, 2011. However, the comprehensive plan is a guide and not a document used for

²⁵ Findings, Conclusions and Decision, paragraph 1, p. 22 (3-7-12).

²⁶ Petso and Southcote-Want Appeal, March 30, 2012, p. 3.

²⁷ The Council notes that the Appellants may be misinterpreting a case in which the Court of Appeals did not allow a developer to “take advantage of a change in the law allowing a previously prohibited land use” by selectively determining which laws it would comply with – those it was vested to or the new laws. *East County Reclamation Co. v. Bjornsen*, 125 Wash. App. 432, 439, 105 P.3d 94 (2005). However, in this situation, all of the evidence from City Staff and the Applicant demonstrates that the Applicant is not selectively choosing which laws to comply with, it is only exceeding the requirements in the 1992 *DOE Manual* in at least one respect. The Washington courts have expressly recognized that a developer could choose to exceed the requirements in a newer version of a stormwater manual. *Phillips v. King County*, 136 Wn.2d 946, 879-880, 968 P.2d 871 (1998):

Under current law, as required by the subdivision statute, RCW 58.17.033, a subdivision application is reviewed under the codes, ordinances and regulations in effect at the time a complete application for preliminary approval is filed. . . . Since the application for the Autumn Wind project was submitted in 1988, the plans for the development were reviewed pursuant to the 1979 Surface Water Design Manual. As noted above, a new surface water drainage code was adopted by King County in 1990, but it did not apply to the Autumn Wind project because the project was vested to the prior code under RCW 58.17.033. Therefore, developer Lozier had to decide whether to meet only the requirements of the older code or whether to exceed its requirements and meet the modern criteria. While Lozier could have exceeded the code requirements absent some SEPA consideration, the County was bound by the vested rights doctrine to apply the requirements of the code in effect at the time of the project’s application.

making specific land use decisions.²⁸

3. Stormwater Design. The Hearing Examiner noted that “the stormwater design at this phase is preliminary and that the Applicant’s burden at this preliminary phase is to provide a ‘feasible’ stormwater design. The civil construction plans will be reviewed during the final design of the utility improvements for compliance with the City’s stormwater code (then current ECDC 18.30). . . . The final design of the stormwater system is not at issue here.”²⁹

The Washington courts have held that:

A preliminary plat application is meant to give local governments and the public an approximate picture of how the final subdivision will look. It is to be expected that modifications will be made during the give and take during the approval process. . . . The applicant must make a threshold showing that the completed development is able to comply with applicable zoning ordinances and health regulations.³⁰

“The preliminary plat application cannot be approved if the applicant cannot show that its plat is able to comply with all relevant requirements.”³¹ “The purpose of a preliminary plat is to secure approval of the general ‘design’ of the proposed subdivision and to determine whether the public use and interest will be served by the platting.”³² “Matters which are specified by regulation or ordinance need not be considered unless conditions or infirmities appear or exist which would preclude any possibility of approval of the plat.”³³

While the process anticipates negotiations and modifications, the preliminary plat process is not merely an insignificant stage of the proceedings without real consequence. . . . Any modifications included in a conditional approval of the preliminary plat are binding on the party seeking approval and the local decision-making body granting conditional approval. . . . A local decision-making body cannot conditionally approve a preliminary plat and then disapprove a final plat application for a project that conforms to the conditions of the preliminary approval.³⁴

²⁸ *Lakeside Industries v. Thurston County*, 119 Wash. App. 886, 894-5, 83 P.3d 433 (2004).

²⁹ Order on Reconsideration, p. 2-3, No. 1.

³⁰ *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011).

³¹ RCW 58.17.195; *Friends of the Law v. King County*, 123 Wash.2d 518, 869 P.2d 1056 (1994).

³² *Topping v. Pierce County Board of Commissioners*, 29 Wash. App. 781, 783, 630 P.2d 1385 (1981).

³³ *Id.*, 29 Wn. App. at 783

³⁴ *Knight of City of Yelm*, 173 Wn.2d 325, 344, 267 P.3d 973 (2011).

Here, the Hearing Examiner found that the Applicant satisfied the above threshold requirements. The Appellants must demonstrate that the Examiner's decision is clearly erroneous, but in general, the Appellants argued that there wasn't sufficient evidence to demonstrate, at this time, that the drainage plan is adequate. It appears that the majority of the Appellants' complaints reflect dissatisfaction with the multi-step process involved in preliminary plat approval. However, the preliminary plat approval process involves conceptual review, which looks to the "feasibility" of the proposed subdivision. Submission of a final drainage plan is not required to obtain approval. In order to obtain final plat approval, the drainage system must comply with the conditions of approval, the City's codes and *Stormwater Manual* and be approved by the Public Works Department.³⁵

4. Vault Sizing and Maintenance. The Appellants claimed that the Hearing Examiner erred in determining that the vault was of the proper size or that the testing required by the Court of Appeals had been done. According to the Appellants, the infiltration rate proposed by the Applicant (2.3 inches/hour) has not been settled upon, and without adequate testing, there is no way to know whether the proposed vault is of the proper size, and if it is not, the Applicants will not be able to fix it later due to site constraints.

The Applicant admitted that details such as exact elevations and the size of the control structure are typically worked out at the final engineering level. The Applicant's engineer stated that the drainage analysis has been revised to 2.3 inches/hour to provide safety factors recommended by the soils engineer and geotech. Individual dry wells will be designed at final

³⁵ See, *Friends of Cedar Park Neighborhood v. Seattle*, 156 Wash. App. 633, 646, 234 P.3d 214 (2010) (neighborhood group wanted more information at the short plat approval stage about the specific drainage system that would be designed, rather than at the building permit stage, but nature of subdivision process involves conceptual review, looking at the "feasibility" of the proposed subdivision).

engineering. Individual dry wells will be installed with the building permits for the individual houses. The main vault will be designed at final engineering and will be installed or bonded for prior to final plat approval. The test pits on individual lots can be conducted at final engineering, but the individual dry wells will not be installed until construction of the individual lots occurs. These individual dry wells are smaller infiltration systems that will be placed on each individual lot, where feasible based on engineering requirements. As to the vault, the Applicant stated that a six foot vault is an interpretation by the Appellants based on the 1992 Manual and the volume of storage proposed. The actual height inside the vault will be at least seven feet, with only six feet used for storage. The testing performed by the Applicants showed that the soils were adequate and resulted in the infiltration rate of 2.3 inches/hour. Both the Staff and the Applicants noted that the vault was sized assuming that there were no additional infiltration systems on any of the individual lots.

As to maintenance, the Appellants argued that the Homeowners' Association would be required to maintain the storm drainage facilities, but there were no standards in the City's ordinances. The Staff admitted that the property owners are responsible for the maintenance, operation and repair of the storm drainage system.³⁶ However, the City's code allows the City to inspect the systems and to require that the property owners maintain the stormwater facilities to current standards (as set forth in the current version of ECDC 18.30). If necessary, the City has enforcement procedures that may be implemented to ensure that the stormwater facilities are being properly maintained.

The Staff noted that the standard practice for all developments is for the final drainage plan to include a maintenance bond, which requires the developer to properly maintain the

³⁶ Staff Memo of May 4, 2012, p. 6.

system for two years. After the bonding period is completed, the system is inspected. If it meets City standards, the bond is released and the maintenance of the facility becomes the responsibility of the property owners. In addition, the Hearing Examiner addressed this in specific conditions of approval (No. 4 and 5).³⁷

L. ***Perimeter Buffer.*** The original application submitted by Burnstead did not comply with the City's requirements for a perimeter buffer. On the revised application, Burnstead chose to apply the standard setbacks applicable to the RS zone for all lots adjacent to the perimeter of the development. Because standard setbacks are applied, the application conforms to code and the perimeter buffer required by ECDC 20.35.050.C.2 is no longer required.

The Appellants argued that the use of standard setbacks rendered the lots undevelopable and the proposed homes would be too large for the lots. However, the lot sizes were found to be generally 6,000 square feet and the smallest house was two stories with 2,855 square feet. This did not create lots so small as to be undevelopable under the City's standards.

The Applicant also responded that the homes would be properly sized to fit on the lots. It was claimed that the Appellants were promised that if the design of the homes changed, they would go back to the Architectural Design Board for review. The Applicant noted that the proposed designs were not submitted for a building permit and as a result, were not final or to scale. Staff responded that final home designs are not typically submitted for a PRD and commented that the Hearing Examiner's March 7, 2012 decision noted that it was clear from the record that building designs were meant to be conceptual in nature and not binding as to design.

M. ***Open Space.*** The Appellants argued that the PRD required "usable open space,"

³⁷ Record at 00024.

but that the open space tracts in the preliminary plat/PRD did not have “usable open space.” For example, the Appellants argued that Tract E is designated for wildlife protection and within a fish and wildlife conservation area. The staff pointed out that it had been previously determined that Tract E is not within a fish and wildlife habitat conservation area.

It was also argued that Burnstead Construction plans to “take property” (ranging from 4 inches at the southwest corner to 16-18 inches) from the landowners on the western border of the property in order to meet the requirements for open space. However, the Appellants provided no authority to demonstrate that the City of Edmonds had any jurisdiction over this issue whether Burnstead Construction had “taken” private property from them.

In addition, the Appellants believed that Tracts A and F were fully landscaped at the entrance of the plat and occupied by a monument sign and tiny lawn, so any attempt to use those parcels would be dangerous. The Appellants also mentioned parking and traffic as a safety concern.

Staff pointed out that the definition of “usable open space” was included in ECDC 20.35.050(D), which means common space, developed and perpetually maintained by the property owners. According to the staff, the amount of open space provided by the Applicant satisfied the open space requirement in ECDC 20.35.050(D), or 24,422.7 square feet. Four tracts totaling 25,185 square feet have been provided.³⁸ It should also be noted that the open space provided by the Applicants is similar to the examples of “usable open space” in ECDC 20.35.050(D), such as “garden space” and “passive recreational areas.”

The Court of Appeals limited the remand to the Examiner to “the issues concerning the

³⁸ Staff Memo of May 4, 2012, p. 3, citing to the Record at 000088.

drainage plan, the perimeter buffer and open space *that we discuss in this opinion.*”³⁹ The Appellants have not shown how issues of traffic and parking were included in the remand, other than proximity to the open space.

CONCLUSIONS.

1. The Hearing Examiner and Council are limited in this remand to the consideration of three issues relating to the subject development – drainage plan, perimeter buffer and open space.

2. The Hearing Examiner conditionally approved the preliminary plat and PRD, requiring that the Applicant demonstrate compliance with all stormwater best management practices requirements pursuant to the *Stormwater Management Manual for the Puget Sound Basin*, Department of Ecology, (1992), including the ultimate value for the design infiltration rate, even if more recent methodologies are employed to determine the design parameters of the stormwater facility.”⁴⁰ The Appellants have not met their burden to demonstrate that this condition made by the Hearing Examiner in the Findings, Conclusion and Decision or the Order on Reconsideration is clearly erroneous.

3. The Hearing Examiner determined that the perimeter buffer was not required for this preliminary plat and PRD because the revised application conforms to the standard setbacks allowed in the RS-8 zone for all exterior lots.⁴¹ The Appellants have not met their burden to demonstrate that this conclusion made by the Hearing Examiner in the Findings, Conclusion and Decision or the Order on Reconsideration is clearly erroneous.

4. The Hearing Examiner determined that the open space provided in the

³⁹ Emphasis added, page 24 of the Court of Appeals Decision, No. 64496-3.

⁴⁰ Hearing Examiner Findings of Fact and Conclusions, No. 8, p. 24 (000024.)

⁴¹ Hearing Examiner Findings of Fact and Conclusions, No. 10; Order on Reconsideration, No. 4, p. 6; 000037.

preliminary plat and PRD conformed to ECDC 20.35.050(C) for open space.⁴² The Appellants have not met their burden to demonstrate that the Hearing Examiner's Decision or the Order on Reconsideration is clearly erroneous.

DECISION

The City Council affirms the Hearing Examiner's Findings of Fact and Conclusions and Order on Reconsideration as modified below. This includes the Hearing Examiner's determination that the Woodway Elementary preliminary plat and PRD meets all of the requirements of the City's codes applicable to preliminary plat approval, planned residential approval, and all requirements for approval of preliminary plats in the State Subdivision Act, including but not limited to RCW 58.17.110.

A. The City Council modifies Condition No. 8 of the Hearing Examiner's Decisions to additionally require that the Applicant post a two-year maintenance bond for the stormwater drainage system after final inspection and approval.

B. The City Council adds a Condition No. 9 to the Hearing Examiner's Decisions to require that the Applicant install individual lot infiltration systems on each lot unless determined to be infeasible based on engineering principles.

RESOLVED this 4th day of June, 2012.

CITY OF EDMONDS


COUNCIL PRESIDENT STROM PETERSON

⁴² Hearing Examiner Findings of Fact and Conclusions, No. 11; Order on Reconsideration, No. 5, p. 6; 000037.

Appeals

This decision may be appealed according to chapter 36.70C RCW, within the deadlines set forth in RCW 36.70C.040.